BEFORE THE HUMAN RIGHTS COMMISSION
OF THE STATE OF MONTANA

Caryn Kennedy, Charging Party,	**Human Rights Act Case No. 9401006139**
versus	*Findings of Fact, Conclusions of Law and Proposed Order on Remand*
BE Team Limited Partnership, a Montana Partnership doing business as **Dos Amigos**, Robert Riso, general partner, Respondent.	

I. Procedure and Preliminary Matters

Caryn Kennedy filed a verified complaint with the Montana Human Rights Commission on October 7, 1993, alleging that she was sexually harassed by employees of respondent on a continuing basis throughout her employment, and was retaliated against for complaining of discrimination. She alleged violations of §§49-2-301 and 49-2-303(1)(a) MCA. The Commission certified the case for contested case hearing on April 11, 1996, and assigned Terry Spear as hearing examiner.

The original contested case convened on July 8, 1996, in the Justice Court, Large Courtroom, Second Floor, 920 South Main, Kalispell, Montana. Kennedy was present. Respondent designated Robert Riso, general partner, as its representative. David Hawkins represented charging party. Sean Hinchey, of the John A. Lence Law Firm, represented respondent.

Exhibits offered and admitted by stipulation were charging party's Exhibit 1 (Policy Manual) and 2 (Employee Hours), and respondent's Exhibit A (guest checks and adding machine tapes), B (Calendar) and C (Gift Certificate). In this decision and the record, the exhibits of "charging party" are referenced, although labeled as "Plaintiff's" exhibits. Charging party called as witnesses Cindy Blanc, Dana Burrett, Tami Randall, Robert Riso (as an adverse witness) and the charging party, Caryn Kennedy. Blanc, Burrett and Randall all worked as waitresses in the Kalispell restaurant during at least part of the pertinent time period. Respondent called as witnesses Heather Schneider, Traci Boggs, John Shryock, Robert Riso and Shanna Mitton.

At the conclusion of the evidence, counsel for both parties elected to give oral closing arguments in lieu of submitting written closing arguments. At the end of the closing arguments, the hearing examiner deemed the case submitted for decision.

The hearing examiner issued his proposed order on September 23, 1996. On October 11, 1996, respondent filed exceptions to the proposed order. The parties filed a transcript of the hearing record and exhibits, and after briefing by all parties, the Montana Human Rights Commission heard oral argument on January 20, 1997, at its regularly scheduled meeting in Missoula, Montana. Julie Ann Hinchey appeared on behalf of respondent, and David A. Hawkins appeared on behalf of charging party. All Commission members were present, and indicated they had reviewed the record, consisting of the complaint, the final prehearing order, the contested hearing record, a transcript of proceedings, the hearing examiner's findings of fact, conclusions of law and proposed order, the exceptions, and briefs of both parties on the exceptions.

After its review of the record, and full consideration of the exceptions, the Montana Human Rights Commission overruled the exceptions of the respondent and adopted the findings of fact, conclusions of law, and proposed order of the hearing examiner as its final order on February 5, 1997. Respondent sought relief from district court. On November 30, 1999, the clerk of the district court forwarded an order remanding the case to the Commission for further proceedings. On December 2, 1999, the Commission remanded the case to the hearing examiner for further proceedings in accord with the district court order.

On January 2, 2000, the hearing examiner set a hearing on remand. On February 28, 2000, Respondent requested a continuance. On March 23, 2000, with the concurrence of both parties, the case was reset for June 22, 2000. Due to a scheduling conflict the hearing examiner later reset the case for June 23, 2000. On that date the rehearing proceeded. Respondent called one witness, John Vantresca. Charging party called no witnesses. The parties offered no new exhibits. After an opportunity for oral argument, the parties agreed the case was now submitted for decision.

II. Issues

The sole issue on remand is whether the testimony of John Vantresca changes the findings of fact. A full statement of the issues appears in the prior decision and in the final prehearing order.

III. Findings of Fact[1]

1. Caryn Kennedy is the charging party. Respondent is BE Team Limited Partnership, a Montana Partnership, doing business as Dos Amigos, Robert Riso, general partner (hereinafter referred to as "Dos Amigos"). Dos Amigos had sold the Kalispell operation to others prior to 1993. Dos Amigos resumed operation of the

1 Based upon the testimony of Vantresca, paragraphs 6, 7, 10, 11, 16, 21, 22 and 23 of the findings of fact contain revisions.

establishment in February of 1993, taking it back from the previous operators. Two general partners, Riso and John Shryock, were directly involved in the operation of this restaurant starting in February of 1993. Riso was the direct manager of this restaurant. Shryock worked there, but spent less time in this restaurant and left management decisions to Riso. Riso did consult with Shryock about management decisions.

2. The parties stipulated that charging party was employed by respondent as a waitress at the Kalispell Dos Amigos restaurant from February 1993 until June 9, 1993.

3. The possibility of a problem between Caryn Kennedy and some of the cooks was known to Dos Amigos from the beginning. Kennedy was working for the previous operators at the restaurant as assistant manager when Dos Amigos resumed operations in February of 1993. She was offered a waitress position by Dos Amigos. Riso asked her then whether she would be comfortable as a waitress, working with cooks over whom she had exercised supervision as an assistant manager. She assured him it would not be a problem.

4. It did become a problem, almost immediately. Joe House, one of the cooks who worked regularly during her shift, bore some personal animosity toward her. Joined by Ed Horn, another of the cooks, he engaged in a campaign of harassment by cursing Kennedy, making crude and offensive sexual comments toward her, and occasionally touching her inappropriately. The two cooks were supervised by John Vantresca.

5. Kennedy was sexually harassed by Horn and House and also by the cook supervisor, Vantresca. At least one other male employee of Dos Amigos also participated in the harassment (John Badewitz, identified as a manager in the Dos Amigos in Whitefish and a part-time cook in the Kalispell restaurant where Kennedy worked).

6. Kennedy complained to Vantresca about the harassment. No action was taken on her complaint. Vantresca, Riso and Shryock denied receiving her harassment complaints or notice of any such complaint.

7. Kennedy did not engage in or initiate the conduct and conversation of which she complained. Her dress and behavior at work did not invite the harassment. She wore a blouse more revealing than John Vantresca considered appropriate, but this choice of apparel did not encourage or invite the harassment the cooks visited upon her. Neither did she, by rather innocuous comments to Vantresca, signal her willingness to be the subject of repeated sexual harassment.

8. The sexual harassment occurred regularly, with multiple instances happening during each shift worked by Horn and House. Blanc, Burrett and Randall, as well as charging party, testified to multiple instances of harassment. Specific

instances proved at hearing illustrate the tone and degree of harassment involved. Horn and House called Kennedy a "fucking bitch" and like terms, on a daily basis. They made sexual comments about appearance, such as the appearance of Kennedy's nipples. They directed sexually suggestive behavior with and comments about the food being prepared toward Kennedy. In another instance, Kennedy received a written note from Ed Horn, after he and House had discussed oral sex in her presence. The note she received read, "Do you swallow?" Kennedy, in a joking reference to the hostility of the two, suggested once that House would like to drown her. Horn responded, "We'd like to get you by your neck and drown you in semen." In one instance, Badewitz told Kennedy that the kitchen staff, including the kitchen supervisor, "were discussing how we'd like to get you out on our property and tie you to a tree and butt fuck you to death." Burrett and Randall recognized this comment as something they had heard at work.

9. Other women serving customers at the restaurant were also subjected to the harassment, to a lesser degree. Dana Burrett confronted Horn and House about their unacceptable behavior. They stopped directing comments toward her. Blanc and Randall avoided the two cooks, staying away from them as much as possible. Because of the "vendetta" Joe House was conducting against Kennedy, she was unable to avoid the harassment.

10. Kennedy did complain of sexual harassment during her employment. Vantresca, Riso and Shryock categorically denied receiving complaints of "sexual harassment." Kennedy's complaints may not have involved the words "sexual harassment," and were couched in terms such as "sick," "gross" and "disgusting." But Kennedy did directly complain to Vantresca, Riso and Shryock while she was still employed by Dos Amigos.

11. Vantresca, Riso and Shryock had knowledge of the conduct of the cooks. Their denial of such knowledge, in light of the detailed accounts of Kennedy and the corroborating testimony of Blanc, Burrett and Randall about the conduct of the cooks, is not credible. Vantresca was in the restaurant and directly in contact with the cooks and Kennedy on every day that he worked. Riso was in the restaurant on a daily basis. Shryock was in the restaurant on at least a weekly basis. All three men had ample opportunity to observe the interchanges between Horn and House and the waitresses, even if most of the harassment occurred in the kitchen area. The loud foul language, the derisive, suggestive and directly sexual comments and occasional "poking" of waitresses, were all there to be heard and seen.

12. Dos Amigos' explanation that no action was taken because management lacked knowledge of sexual harassment is also incredible given the conduct of the partners regarding sexual harassment. Some of the waitresses who testified did recount a staff meeting at which the sexual harassment policy of Dos Amigos was discussed. Riso indicated at this meeting, the date of which was not established, that sexual harassment was not acceptable. The waitresses who witnessed Kennedy's

harassment, and were subjected themselves to lesser degrees of such harassment, also testified to a reluctance to complain about the harassment. They indicated uncertainty about what, if anything, management could be expected to do if they were to complain. John Shryock admitted receiving, during Kennedy's employ at Dos Amigos, one complaint about Horn's language. In the only instance presented of any action being taken in response to at least a minimal awareness that Horn and House were acting inappropriately, Shryock waited until the end of the busy period of that shift, then stuck his head into the kitchen and said, "Ed, cut that out." Dos Amigos neither took disciplinary action against Horn nor made any record of this exchange.

13. Dos Amigos failed to enforce its own policies regarding sexual harassment. Charging Party's Exhibit 1, the policy manual, identified major infractions justifying immediate discharge, including "anti-social behavior." The manual defined anti-social behavior, in part, as being "abusive toward a customer or fellow employee." The manual did not define sexual harassment as a major infraction. Sexual harassment was a minor infraction, defined in part as "b. Verbal abuse of a sexual nature; c. Graphic or suggestive comments about an individual's dress or body." Minor infractions triggered a three step disciplinary procedure of verbal warning, then written warning, then discharge. Dos Amigos did not follow this policy. Dos Amigos did not treat the one half-hearted comment to Ed Horn as the first step of the three step disciplinary procedure for a minor infraction. Dos Amigos took no action against the cooks for their continual harassment of Kennedy.

14. Kennedy performed her daily job duties in a satisfactory, though not exemplary, manner. She had two performance evaluations during the six months she worked for Dos Amigos. Her two performance evaluations were mixed. Her demeanor was erratic, sometimes resulting in praise from customers, other times resulting in complaints. Dos Amigos did not discipline Kennedy for poor performance in either of the two mixed evaluations. Her mixed performance reviews did not give rise to the decision to fire her.

15. During Kennedy's last shift, on June 8, 1993, she had an altercation with the cooks. Ed House was giving her directions which included the usual verbal abuse. She responded to House's verbal abuse by saying, "I'll take [the food] out when I'm damned good and ready." She did not then immediately obey the obscenity-laced command to deliver an order to customers.

16. Vantresca reported to Riso that Kennedy refused to take an order to customers, and that the order sat for fifteen minutes and grew cold. Vantresca reported that Kennedy was verbally abusive. Riso accepted as fact the kitchen staff's account of altercation on June 8, 1993. Riso was not clear on whether he talked to the cooks as well as Vantresca about the incident. He did not talk to Kennedy before deciding what had happened. He did not discuss firing Kennedy with Vantresca, who was unaware that such a decision might be the result of his complaint to Riso. Riso talked with Shryock about the "continued tension" between Kennedy and the

cooks. It was clear to both men during that conversation that Riso had already decided to fire Kennedy, even though he had yet to discuss the incident with her.[2]

17. On June 9, 1993, Riso asked Kennedy to come in and visit with him. She had no indication of the reason for the meeting. She unrealistically expected to be promoted. Instead, Riso fired her. Riso advised her that there were "some problems." He told her that her work was substandard and that the kitchen staff found her intolerable. There is no credible evidence that Riso ever obtained any detailed account from her of what had happened on June 8, 1993.

18. Dos Amigos did not discharge Kennedy for poor job performance, but for her refusal to submit to the continuing sexual harassment. Her mixed reviews did not trigger disciplinary action. Dos Amigos gave her no written warnings regarding job performance. The slow service on June 8, 1993, arose out of Kennedy's resistance to the continued harassment. The one-sided process of "investigation" led to an immediate decision to fire her as a solution to the "tension" with kitchen staff. Had she continued to endure the harassment without lashing back, no justification for her discharge would have been presented.

19. Dos Amigos' multiple explanations of why Kennedy was fired are not reliable. Riso gave different explanations of why he decided to fire Kennedy. At first, called as an adverse witness in charging party's case, he testified that he fired Caryn Kennedy for late service. He stated that failure to provide reasonably prompt service is grounds for immediate termination. This is not in the policy manual. According to Shryock, Riso's primary reason for firing Caryn Kennedy was that in addition to multiple customer complaints, the continued tension between kitchen staff and Kennedy was a serious problem. According to Riso, when he resumed testifying in respondent's case after Shryock, he decided to fire Kennedy because of customer complaints and refusal to deliver food on direction (basically, insubordination toward the kitchen staff). Riso also testified that Kennedy "lied to them" numerous times. The "lies" involved alleged discrepancies on guest checks, Respondent's Exhibit A, which have not been adequately explained by Dos Amigos' witnesses. Dos Amigos did not establish when and how the discrepancies were discovered. Dos Amigos also failed to show why the discrepancies occurred or what their significance was. Respondent failed to prove whether the discrepancies were deliberate undercharges, concealed errors, promotional discounts, honest mistakes or even genuine discrepancies.

20. Kennedy's average monthly wage exclusive of tips was $711.02. Dos Amigos paid her $4.10 an hour to work as a waitress. Charging Party's Exhibit 2

[2] During questioning by the hearing examiner, it was noted that Riso decided to fire Kennedy without ever asking for her account of the incident. At that point in his testimony, Riso said that he had talked to her first. He provided no explanation of when or how he talked to her about the incident *before* deciding to fire her. This belated change in testimony was not credible.

documented her hours of work. Dos Amigos noted work times variably, sometimes on 12 hour basis and other times on a 24 hour (military clock) basis. The time records had minutes for some entries, and other times tenths of hours appeared. With minutes and tenths of hours converted to consistent decimals, Kennedy worked 520.25 hours from March 5, 1993 (the first date on the time sheet) through June 8, 1993. This period of 96 days was almost exactly three months. She averaged 173.42 hours a month, at $4.10 an hour.

21. Based on the credible evidence of record, Kennedy's tip income averaged $7.00 per hour, a reasonable figure for an evening shift in a restaurant with at least a partial liquor license. Kennedy testified that she earned $70.00 to $100.00 in an average eight hour shift. Vantresca testified that the waitresses, based on the 10% they were required to share with the cooks, made from $30.00 to $60.00 a shift in tips. Neither side produced any tax records or business records which would support either account. Kennedy testified both that she did report her tips to the employer, and that she did not. She could not remember with certainty whether or not she did. Dos Amigos did not produce any records of her tip income. Respondent had ample opportunity in discovery to obtain Kennedy's tax records, and offered no evidence of a lower reported income. However, Kennedy's inconsistent testimony regarding reporting of tips called into question the accuracy of her numbers. An average for Kennedy of $7.00 per hour in tips is proper.

22. Kennedy's average net tip income per month was 90% of $1,213.94, or $1,092.55. Kennedy paid 10% of her tip income to the kitchen staff. This was part of the terms and conditions of her employment.

23. Kennedy's total wage loss was $17,003.84. She was unemployed until October 2, 1993. Her wage loss was $1,803.57 per month for the four months before she obtained any work, for a subtotal of $7,214.57. From October of 1993 until June of 1994, she earned $580.00 per month working as a motel desk clerk. Her wage loss for that eight months was $1,223.57 per month, for a subtotal of $9,789.56. In June of 1994, she obtained a second job, and her wage loss ceased. Interest at 10% per annum on the lost amounts is $817.89 for the first year (ending June 1, 1994), and $1,700.38 for each year thereafter, at $4.6586 per day.

24. Kennedy also suffered emotional distress. She still deals with the emotional aftermath of the sexual harassment and firing. The environment in which she worked, and the barrage of comments and behavior, caused her to feel "small," "naked," "helpless," "uncomfortable." She had always thought of herself as a strong and good humored woman. She found herself feeling degraded, "a nobody," "a walking display." Her demeanor and tone of voice during her testimony, and the virtual absence of any expression during her testimony about the particulars of the harassment (in an otherwise fairly animated witness), confirm that she indeed suffered emotional distress as a direct result of the sexual harassment to which she was subjected, and that the emotional distress she suffered has continued. She has

not sought professional help. The degree of continuing emotional distress is within her capacity to endure. She is entitled, nonetheless, to monetary compensation for this harm. The amount appropriate to compensate her for her emotional distress is $8,500.00.

25. There is a risk of further discriminatory acts by respondent against other employees. The degree of blindness and indifference demonstrated in this case proves a clear risk of other female employees being subjected to similar treatment.

IV. Opinion

After hearing and considering the testimony of John Vantresca, the hearing examiner deleted the sentence in Finding of Fact No. 6 that called Kennedy's testimony of harassment uncontested. The hearing examiner also altered various findings because of Vantresca's testimony. The hearing examiner has also revised this opinion to address that testimony.

Workplace harassment based on gender is an unlawful discriminatory practice prohibited by the Montana Human Rights Act. §49-2-303(1) M.C.A.. An employment environment permeated with unwelcome and sufficiently abusive sexual comment alters the terms and conditions of employment and creates a hostile working environment that violates the employee's right to be free from discrimination. *Brookshire v. Phillips*, HRC Case No. 8901003707 (April 1, 1991), ***affirmed sub. nom****. Vainio v. Brookshire*, 852 P.2d 596 (Mont. 1993). Pervasive use of derogatory or insulting sexual language directed toward an employee and addressed to her because she is a woman is evidence of a hostile environment. *Andrews v. City of Philadelphia*, 895 F.2d 1469, 1485 (3rd Cir. 1990). ***See, gen.***, *Anthony v. Cyphers*, HRC Case No. 9401006105 (Feb. 24, 1995).

Caryn Kennedy was subjected to vicious, frequent and reprehensible instances of sexual harassment. Three of the four identified harassers, John Vantresca, John Badewitz and Joe House, were listed as witnesses. Kennedy's testimony regarding all four men is largely unrebutted. Vantresca's testimony is credible to the extent that he did not recognize any problem between Kennedy and the cooks except her struggle against their directions. But given the other testimony corroborating Kennedy's accounts of harassment, Vantresca's blind eye to what was happening in front of him renders his testimony that there was no harassment less than credible.[3] His denial of any participation in harassment is also less than credible, given his incredible testimony that the kitchen staff and the waitresses engaged in friendly banter and teasing and were "pretty tight" as a group. The corroborating testimony of Kennedy's witnesses renders Vantresca's accounts of relations between kitchen staff and waitress wholly incredible. The facts of the harassment still cannot seriously be disputed.

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3 "Vantresca's testimony regarding his religious belief and practice cannot be considered to bolster his credibility. Rule 610 M.R.E."

Respondent's primary attack upon Kennedy is upon her testimony that she reported the harassment. Her testimony regarding a complaint to Vantresca is undisputed in the evidence, except for Vantresca's less than credible denial. Her testimony that Vantresca, the cook supervisor, participated in the harassment, is also undisputed in the evidence, except for Vantresca's denial, also less than credible. If this were the only evidence regarding notice, charging party would prevail.

Montana has a statutory definition of notice, in §1-1-217 M.C.A.:

> (1) Notice is:
>
> (a) actual whenever it consists of express information of a fact;
>
> (b) constructive whenever it is imputed by law.
>
> (2) Every person who has actual notice of circumstances sufficient to put a prudent man upon inquiry as to a particular fact has constructive notice of the fact itself in all cases in which, by prosecuting such inquiry, he might have learned such facts.

Vantresca was an agent, as employee and supervisor of cooks, of Dos Amigos, with the power to report problems involving waitresses and cooks. He exercised this power to obtain termination of Kennedy's employment, without even knowing it. He could and should have exercised this power to advise management of her complaints. Whether or not he did so, the knowledge he should have conveyed to management is imputed to management. Vantresca's denial of any knowledge of complaints or harassment is not credible. Kennedy and her corroborating witnesses are more credible.

Against Dos Amigos, both Dos Amigos and Vantresca on behalf of Dos Amigos are deemed to know what either knows and should tell the other. §28-10-604 M.C.A. "Knowledge of the existence of a claim will be imputed to a party who has sufficient information to put it on inquiry notice of that claim. *McGregor v. Mommer*, 220 Mont. 98, 108, 714 P.2d 536, 542 (1986)." *Benson v. Pyfer*, 240 Mont. 175, 180, 783 P.2d 923, 926 (1989). Vantresca's knowledge of Kennedy's complaint and of the harassment, even had he not participated in it, are imputed to Dos Amigos under Montana law.

Federal law, to which the Commission looks for guidance, mandates the same conclusion. "Employers are liable for failing to remedy or prevent a hostile or offensive work environment of which management-level employees knew, or in the exercise of reasonable care should have known." *EEOC v. Hacienda Hotel*, 881 F.2d 1504, 1515-16 (9th Cir. 1989). "[V]arious circumstances may be considered in determining employer liability, such as the duties and authority of the supervisor, and the existence and efficacy of anti-discrimination policies and grievance procedures." *Nichols v. Frank*, 732 F.Supp. 1085, 1090 (D.C.Or. 1990). "Lack of notice does not insulate the employer from liability, especially when . . . the harassing employee was also the official through whom a complaint would otherwise have been

lodged." *Woods v. Graphic Communs.*, 925 F.2d 1195, 1202 (9th Cir. 1991) (racial discrimination). ***See*** *Mitchell v. Keith*, 752 F.2d 385 (9th Cir.), ***cert. denied***, 472 U.S. 1028 (1985); *Miller v. Bank of America*, 600 F.2d 211 (9th Cir. 1979).

But management's protestations of ignorance are not credible. Kennedy did not say to Riso or Shryock, "I am being sexually harassed by Horn and House." She did complain of bad language, sick remarks and gross and disgusting behavior. The testimony from four waitresses, and even from Heather Schneider, who also admitted hearing the foul language of the cooks from the front of the restaurant adequately establishes that management notice. Riso and Shryock had eyes and ears. Had Kennedy said nothing, they had ample notice of what was happening. Her complaints were more than sufficient to give rise to a duty to investigate and pay attention to what was happening before the eyes and ears of management.

Kennedy testified that she had complained to Robert Riso and John Shryock as well as to John Vantresca. She stated she made an initial complaint to Vantresca, but nothing changed. She testified that she made several such complaints to John Shryock. She testified that she complained to Shryock about the "drown you in semen" comment. He said to her, "We're working with Ed and Joe." He told her he would speak to Riso about it. He denies recollection of the complaints, and denies that the complaints occurred.

She also testified that she went to Riso to complain immediately after a remark about the appearance of her nipples. Riso was in front of the restaurant. She told him about it and "he seemed disgusted," but did nothing. She testified that she complained again to Riso, in his office, after another evening of work and abuse. This time, her complaint was that Joe House had said that he did not have to do anything she said, "that I was not his fucking manager and that I could fuck off." Riso's response was that he would be speaking with John Vantresca. She testified to subsequent complaints she made to Riso after that, as well. He denies ever receiving a complaint of sexual harassment from Kennedy.

Riso and Shryock, in seeking to support their denials, focus upon the absence of complaints in performance evaluations and in a post-firing meeting Kennedy inaugurated with Shryock. Kennedy agreed that she did not complain about the harassment during performance reviews. She did not see performance reviews as appropriate times to complain about harassment. She says she did mention the harassment in the post-firing meeting. Shryock denies it. Traci Boggs was present at the meeting at the home she shared with Shryock. She did not hear such complaints while she was present. But whether Kennedy complained after she was fired and before she filed a formal complaint is not relevant.

The testimony of Riso and Shryock about receiving no complaints before firing Kennedy is simply not credible. Their stance of wronged innocence is not believable. Weighed against the testimony of Kennedy, Blanc, Burrett and Randall, management

appears blind, not ignorant. Failing to see what is there to be seen is not a defense to a claim of sexual harassment.

In addition to the poorly explained guest checks and adding machine tapes, Dos Amigos offered evidence of Kennedy's poor service. Shanna Mitton was called by Dos Amigos to testify about Kennedy's poor service. Dos Amigos did not prove when Mittons had their experiences with Kennedy. Most of Mitton's testimony was a recitation of how upset her ex-husband had been about it. She testified that her husband was so angry at the slow service and lack of courtesy from Kennedy that they stopped coming to the restaurant. She testified to her ex-husband's contact later with management about the poor service, and to receiving a gift certificate and an apology as an inducement to return as customers. The gift certificate, Respondent's Exhibit 3, is dated June 16, 1993. This complaint as well as the management response could have happened after Kennedy was already fired. Dos Amigos did not prove that the Mittons' order was delayed on June 8, 1993. Dos Amigos did not prove that the Mitton complaint triggered the firing.

Despite having complaints as well as compliments about Kennedy's service from the very beginning, Dos Amigos took no disciplinary action against her. There is no evidence that Kennedy was given warnings that her performance was not satisfactory, much less that her job was in jeopardy because of her performance. The evidence adduced about her performance, after-acquired or otherwise, fails to establish a non-pretextual and legitimate, non-discriminatory business reason for her discharge. She was fired because she was not getting along with cooks who were viciously harassing her.

Retaliation is not a precise term for the impetus to charging party's termination.

> To prove retaliatory discharge, the appellant would have to show that (1) she was discharged, (2) she was subjected to sexual harassment during the course of employment, and (3) her employer's motivation in discharging her was to retaliate for her resistance to those sexual harassment activities. *Holien*, 689 P.2d at 1300.

Foster v. Albertson's, Inc., 254 Mont. 117, 127, 835 P.2d 720 (1992), ***citing*** *Holien v. Sears, Roebuck and Co.*, 689 P.2d 1292 (Or. 1984).

Kennedy's discharge resulted from her resistance to the sexual harassment, but she was not discharged for complaining about it. She was fired for refusing to accept the harassment as a condition of her employment. This is a "quid pro quo" discharge rather than a retaliatory discharge. It is part of the charge of sexual harassment. Retaliation has not been proved. Sexual harassment has been. Dos Amigos fired Kennedy for resisting the harassment, creating "tension" between Kennedy and the harassers.

Once a violation has been proven under state or federal civil rights statutes, then emotional harm is compensable if the claimant establishes that (1) distress, humiliation, embarrassment or other emotional harm actually occurred, and (2) the harm was proximately caused by the unlawful conduct of the respondent. ***See, e.g.***: *Carey v. Piphus*, 435 U.S. 247, 264 at n. 20 (1978) (42 U.S.C. 1983 action, denial of voting rights); *Carter v. Duncan-Huggins Ltd.*, 727 F.2d 1225 (D.C. Cir. 1984) (42 U.S.C. 1981 employment discrimination); *Seaton v. Sky Realty Company*, 491 F.2d 634 (7th Cir. 1974) (42 U.S.C. 1982 housing discrimination based on race); *Brown v. Trustees*, 674 F.Supp. 393 (D.C. Mass. 1987) (unlawful denial of tenure opportunity, based on sex); *Portland v. Bureau of Labor and Industry*, 61 Or.Ap. 182, 656 P.2d 353 (1982), ***affirmed*** 298 Or. 104, 690 P.2d 475 (1984) (sex-based employment discrimination); *Hy-Vee Food Stores v. Iowa Civil Rights Comm.*, 453 N.W.2d 512, 525 (Iowa, 1990) (sex and national origin discrimination). Compensable emotional harm resulting from a civil rights violation can be established by the testimony of the injured party alone, *Johnson v. Hale*, 942 F.2d 1192 (9th Cir. 1991), and, in some cases, is inferred from the circumstances. *Carter v. Duncan-Huggins, Ltd.*, ***supra***; *Seaton v. Sky Realty Co.*, ***supra***; *Buckley Nursing Home, Inc. v. MCAD*, 20 Mass.Ap.Ct. 172 (1985) (finding of discrimination alone permits inference of emotional distress as normal adjunct of employer's actions); *Fred Meyer v. Bureau of Labor & Industry*, 39 Or.Ap. 253, 261-262, ***rev. denied***, 287 Ore. 129 (1979) (mental anguish is direct and natural result of illegal discrimination); *Gray v. Serruto Builders, Inc.*, 110 N.J.Sup. 314 (1970) (indignity is compensable as the "natural, proximate, reasonable and foreseeable result" of unlawful discrimination).

The award for emotional distress in this case is slightly more than half that awarded in *Arrotta v. V. K. Putman, Inc.*, HRC Case Nos. 9101004544 and 9109004736 (Sept. 29, 1993). For other examples of such awards, and the bases for them, ***see***, *Stensvad v. Towe*, 232 Mont. 378, 759 P.2d 138 (1988) ($5,000 for mental anguish established through family testimony of embarrassment, sleeplessness, reluctance to go to Rotary Club meetings); *Brookshire v. Harley Phillips, et al.*, ***op. cit.*** ($20,000 award as a result of sexual harassment in the workplace); *Webb v. City of Chester*, 813 F.2d 824 (7th Cir. 1987) (§1983 employment discrimination case, $20,250 awarded for embarrassment and humiliation although claimant only employed for two weeks); *Brown v. Trustees*, ***supra*** ($15,000 award for emotional distress resulting from discriminatory loss of tenure based on sex); *Paxton v. Beard*, Case No. GC89-327-S-0, 58 FEP 298 (N.D. Miss. 1992) ($15,000 award for mental distress in §1983 action in federal court, termination due to pregnancy); *Shelby v. Flipper's Billiards*, HRC Case No. RPa-800185 (Jan. 1983) ($5,000 in denial of public accommodation on account of race); *Capes v. City of Kalispell*, HRC Case No. SGs83-2121 (January 1985) ($750 award for sex based refusal to register child for city baseball).

Kennedy's testimony about reporting her tip income was inconsistent. Vantresca's testimony on this issue was credible. Given Vantresca's conflicting testimony about tips, the hearing examiner has reduced the tip amount to a figure between those suggested by Kennedy and Vantresca respectively.

Affirmative relief is also necessary in this case. The blind eye of Dos Amigos may be opened to sexual discrimination by the monetary award to charging party, and the horrendous cost of this extended litigation. But it is impossible to assume that will be the case. Therefore, the partners should be required to attend classes designed to focus their attention upon the importance of policing sexual harassment in their workplace.

V. Conclusions Of Law

1. Respondent subjected charging party to sexual harassment by its employees on a continuing basis throughout her employment, and fired her for complaining of and resisting the discrimination, in violation of §49-2-303(1)(a) M.C.A.

2. Charging party is entitled to recover $25,503.89 for harm caused by the violation of her rights by respondent and pursuant to §49-2-506(1)(b) M.C.A.. Charging party is entitled to prejudgment interest on the lost wages portion of the award, $17,003.84, at 10% per annum, in the sum of $10,668.14 to September 8, 2000 and thereafter at $4.6586 per day until the Commission's final order.

3. The circumstances of the violation of charging party's rights by respondent indicate that affirmative relief, in addition to an order that respondent refrain from engaging in unlawful discriminatory conduct, is necessary to minimize the likelihood of future violations of the Human Rights Act.

VI. Proposed Order

1. Judgment is found in favor of charging party and against respondent in the matter of Caryn Kennedy's complaint that BE Team Limited Partnership, Montana Partnership, d.b.a. Dos Amigos, Robert Riso, general partner, subjected her to unlawful sexual harassment while employing her, and discharged her because she failed to submit to the harassment.

2. Judgment is found in favor of respondent on the complaint of retaliation.

3. Respondent is ordered to pay to charging party the sum of $25,503.84 for the lost wages and emotional harm caused to her by its unlawful discriminatory acts.

4. Respondent is ordered to pay prejudgment interest at the statutory judgment rate, in the amount of $10,668.14 and $4.6586 per day from September 8, 2000, until the Commission's final order. Post judgment interest accrues by law from the date of the Commission's final order until paid.

5. Within 90 days of the final order in this case, the general partners involved in this case, Robert Riso and John Shryock are ordered each to attend four hours of training, conducted by a professional trainer in the field of personnel relations and/or civil rights law, on the subject of preventing sexual harassment in the workplace. Upon completion of the training, Riso and Shryock shall each obtain the signed statement of the trainer indicating the content of the training, the date it occurred and that each of them attended for the entire period. These statements of the trainer shall be submitted to the Commission staff not later than two weeks after the training is completed.

6. Respondent is further ordered not to violate any of the rights of its employees as protected under the Montana Human Rights Act.

Dated: September 7, 2000.

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Terry Spear, Hearing Examiner for the
Montana Human Rights Commission,
Hearings Bureau, Department of Labor and Industry